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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 554

H. C. RORICK, JOSEPH R. GRUNDY and J. R. EASTON, *Appellants,*

-vs-

BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT, ETC., et al., *Appellees.*

APPEAL FROM DECREE OF SPECIALLY CONSTITUTED THREE-JUDGE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR APPELLEES, TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA.

GEORGE COUPER GIBBS,
Attorney General State of Florida.

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Counsel for Appellees, Trustees of Internal Improvement Fund of the State of Florida.

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CONSTITUTION OF UNITED STATES

CONSTITUTION OF THE STATE OF FLORIDA

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*BRIEF OF APPELLEES**

OPINIONS BELOW

The opinions of the Court below in this case are reported in 57 Fed. (2d.), page 1048, and 24 Fed. Supp., page 458.

STATEMENT OF GROUND OF JURISDICTION

The grounds in which this Court has jurisdiction have been stated by the Appellants in their brief and we do not deem it necessary to further enlarge on this statement.

*Italics in this brief are ours unless otherwise indicated.

STATEMENT OF CASE

This is a suit in equity instituted by Appellants as holders of bonds of the Everglades Drainage District for the purpose of having adjudged unconstitutional and to enjoin the enforcement of Chapters 13,633, 14,717, 17,902, Laws of Florida, 1929, 1931 and 1937, respectively, on the ground that these statutes impair the obligation of Appellants' contract with the Board of Commissioners of the Everglades Drainage District and deprive Appellants of their property without due process of law. The Bill prayed that the Court determine that the Trustees of the Internal Improvement Fund were liable for the taxes on all lands bid off to them by virtue of Section 5 of Chapter 6456 Laws of Florida, 1913, as amended by Chapter 7305, Laws of Florida, 1917 (R. 64, 66, 71, 73, 225, 226), hereinafter referred to as certificated lands, and further prayed that the Court enter an order requiring the Trustees of the Internal Improvement Fund of Florida to pay the Board of Commissioners of Everglades Drainage District all of said taxes found to be due, and that in the event the Trustees of the Internal Improvement Fund failed to pay in full the said amounts, that the said Trustees be directed to render to the Court a full accounting of all the assets which the said Trustees control (R. 66 & 67).

The suit was originally instituted on May 19, 1931, and attacked only the 1929 Act, above referred to. However, by various amendments and supplemental bills (R. 54, 55, 68, 73, 208), the 1931 and 1937 Acts were attacked on various grounds. The parties defendant to this suit were the Board of Commissioners of Everglades Drainage District, a body corporate, the various Tax

Collectors and Tax Assessors of the counties in which the District is situate, the State Treasurer of the State of Florida, as Ex Officio Treasurer of the District, and the Trustees of the Internal Improvement Fund of the State of Florida.

Answers were filed to the original and supplemental Bills of Complaint (R. 111, 166, 167, 201) after motions to dismiss were denied. The Court below decided the case in favor of Appellants (Rorick, et al., vs. Board of Commissioners of Everglades Drainage District, et al., 57 Fed. (2d), 1048), but the order granting the injunction was vacated (R. 205) because of failure of Appellants to post injunction bond. The suit then lay dormant until 1937 when a second supplemental bill was filed praying the same relief as the first bills (R. 208). Motions to dismiss were filed by the Appellees (R. 229, 234) which the Court granted (R. 246) and from this order Appellants appealed.

The Attorney General of Florida only represents in this suit the defendants Trustees of the Internal Improvement Fund, hereinafter referred to as the Trustees. The only questions that will be discussed in this brief is the liability of the Trustees for the payment of delinquent taxes on lands in the District, which they do not own, but which have been bid off to them in accordance with the 1913 and 1917 Acts, hereinabove referred to. It is admitted that the Trustees are liable for the taxes on the lands which they own in the District, as agents of the State, it being their contention, solely, that they do not have to pay taxes on lands owned by individuals in the District when the individuals fail to pay their

taxes, despite the fact that at the tax sale the lands are bid off to them, as agents for the District.

The discussion of the liability of the Trustees for taxes on the certificated lands divides itself into four propositions, as follows:

1. There is no liability under the statutes upon the Trustees to pay taxes on the certificated lands, these statutes being construed in this manner by the Supreme Court of Florida, and this Court is bound to follow that construction.

2. The statutes, if construed to impose the obligation upon the Trustees to pay taxes on the certificated lands are unconstitutional and void because, of defect in the title and because they allow the State to become indebted contrary to the Constitution of the State of Florida.

3. The statute allowing the settlement between the Trustees and Board of Commissioners of Everglades Drainage District having been passed in 1931, and the Appellants having failed to enjoin, if possible, the enforcement of the 1929 and 1931 Acts for 7 years, they are guilty of laches and, therefore, are not entitled to any relief.

4. Under the Eleventh Amendment to the Constitution of the United States, the lower Court had no jurisdiction to entertain this suit as against the Trustees in their capacity as State agents because the suit in effect is one against

the State, there being no provision in the Constitution and Laws of Florida authorizing such a suit against the State.

ARGUMENT

1. THERE IS NO LIABILITY UNDER THE STATUTES UPON THE TRUSTEES TO PAY TAXES ON THE CERTIFICATED LANDS, THESE STATUTES BEING CONSTRUED IN THIS MANNER BY THE SUPREME COURT OF FLORIDA, AND THIS COURT IS BOUND TO FOLLOW THAT CONSTRUCTION.

The bonds in controversy were issued on July 1, 1920; January 1, 1921; July 1, 1921; July 1, 1922; July 1, 1923; January 1, 1925; and July 1, 1925 (R. 43, 46, 48, 50, 52), under and by virtue of Chapters 6456, 7305 and 9119, Laws of Florida, Acts of 1913, 1917 and 1923, respectively.

With reference to the payment of taxes on land in said District held by the Trustees of the Internal Improvement Fund, Sec. 5 of Chapter 6456 (1534 C. G. L. 1927) provides as follows:

> "The lands within the district held by the Trustees of the Internal Improvement Fund shall be subject to the taxes hereby imposed * * * and the said Trustees in furtherance of the trusts upon which the said lands are held are hereby authorized and empowered to pay the same out of any funds in their possession derived from the sale of lands or otherwise."

Section 8 of this Act, as amended by Chapter 6957, Acts of 1915, and Chapter 7863, Acts of 1919, (1537 C. G. L. 1927), provides in part as follows:

> "* * * Except as is herein specifically provided all laws relating to State and county taxes in this State are hereby made applicable to the Everglades Drainage District."

Section 12 of Chapter 6456, as amended by Chapter 7305, Acts of 1917, (1541 C. G. L. 1927) reads as follows:

> "On the day designated in the notice of sale, at 11 o'clock a. m., the tax collector shall commence the sale of those lands on which the drainage tax or assessment has not been paid as aforesaid, and shall continue the same from day to day until so much of each parcel thereof shall be sold as shall be sufficient to pay the drainage tax or assessment, costs and charges thereon, and in case there are no bidders, the whole tract shall be bid off by the tax collector for the Trustees of the Internal Improvement Fund, and shall be held by said trustees during the period herein allowed for the redemption of said lands in like manner and with like effect as lands sold to the State for non-payment of State and county taxes are held by the State, as now provided by law; and the tax collector must offer all such lands as assessed. The land shall be struck off to the person who will pay tax, costs and charges for the least portion of the land, and the portion thereof sold shall be taken from the southeast corner of such parcel and described in a square form, as near as may be."

Section 13 of Chapter 6456 (1542 C. G. L. 1927), reads as follows:

> "The tax collector shall require immediate payment by any person to whom any parcel of such land may be struck off, and in all cases when the payment is not made within one hour he may declare the bid cancelled and sell the land again on the same day or the day following, and any person so neglecting or refusing to pay any bid made by him shall not be entitled, after such neglect, to have any bid made by him received by the tax collector during such sale."

Part of Section 16, Chapter 6456, (1546 C. G. L. 1927), provides as follows:

> "* * * The proceeds from the sale of such lands shall be applied by the said trustees to the payment of drainage taxes and assessments and other obligations of the trustees."

Part of Section 23 of Chapter 6456, being Section 1182, Revised General Statutes, 1920, (1557 C. G. L. 1927), reads as follows:

> "* * * The provisions of this Article shall constitute an irrepealable contract between the said board and said Everglades Drainage District and the holders of any bonds and the coupons thereof, issued pursuant to the provisions hereof. Any holder of any of said bonds or coupons may either at law or in equity by suit, action or mandamus enforce and compel the performance of the duties required by this Article

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of any of the officers or persons mentioned in this Article in relation to the said bonds, or to the collection, enforcement and application of the taxes for the payment thereof: Provided, however, that no obligation authorized by this Article shall be construed as an obligation of this State, but only as the obligation of the drainage district herein created."

The Drainage District was formed in 1913. No bonds were issued under the 1913 Act and there were of necessity no lands in the district on which the tax for bond payment had not been paid. The 1913 law provides when lands in the district are sold for non-payment of taxes that the tax certificates should issue to the Board of Commissioners of Everglades Drainage District. The 1917 law changed this so as to provide that the Tax Collector should bid off the whole tract of land when the taxes were not paid thereon to the Trustees to be held for a period of redemption in the same manner and like effect as lands sold to the State for non-payment of State and county taxes. The Appellants contend that these two Sections were part of the bond contract and because the 1931 and 1937 Acts allowed the lands to be bid off to the Board of Commissioners of Everglades Drainage District, that these Acts violated the contracts and that the 1913 Act, as amended by the 1917 Act, imposed on the Trustees the mandatory duty to pay all delinquent taxes to the Board of Commissioners of Everglades Drainage District at the time the certificated lands were bid off to the Trustees.

At the outset we are confronted with the decision of the Supreme Court of Florida in State ex rel. Board of Commissioners of Everglades Drainage District vs.

Sholtz, Governor, etc., 150 So. 878, 112 Fla. 756, construing these statute . This was a mandamus suit brought by the Everglades Drainage District against the Trustees to compel the said Trustees to pay to the Board of Commissioners all delinquent taxes on certificated lands bid off to them in the district. In holding that the Trustees were not obligated under the Statutes to pay these taxes the Court said:

"Section 1546, Compiled General Laws of Florida 1927, modifying previous acts, provides that the owner of the land at the time of the tax sale or the bona fide successors in title of such owners shall at any time prior to the day of the sale of such land have the right to redeem the same by paying the amount expressed in the face of such tax certificate, together with the interest thereon, as provided in said section, indicating the legislative intent that the lands should be held by the Trustees, in like manner, as lands are held by the State for unpaid State and county taxes.

"We are unable to glean from the various acts relating to the Everglades drainage district any legislative intent that the trustees of the Internal Improvement Fund were or are required to pay for tax certificates issued upon privately owned land within said district when said lands are 'bid off' under the provisions of law to such trustees, until such lands have been sold or redeemed, and we hold that the trustees of the Internal Improvement Fund hold the certificated land and the certificates in trust for the

Commissioners of the Everglades Drainage District."

The District Court followed this decision in dismissing the Bill of Complaint in this case, and correctly so, because it is well established that the Federal Courts are bound to follow the decisions of the highest court of the State in the construction of its statutes.

See: Sutherland's Statutory Construction, Second Ed., Vol. 2, page 614;

Erie R. R. Co., v. *Harry J. Tompkins*, 304 U. S. 64; *Lee v. Brickell*, 292 U. S. 415, 487; 74 Fed. (2d.), Page 914; 93 Fed. (2d.), page 568.

Cargyle v. *New York Trust Co.*, 67 Fed. (2d.), 585; *Waialua Agricultural Co., Ltd.*, v. *Christian*, decided Nov. 7, 1938, and reported in 305 U. S., page 91.

Neblett, et al. v. *Carpenter, etc.*, decided Dec. 5, 1938, and reported in 83 L. Ed., page 193.

J. Bacon & Sons v. *Martin*, decided Jan. 3, 1939, reported in 83 L. Ed., page 313.

City of Texarkana, Tex., v. *Arkansas-La. Gas. Co.*, decided Feb. 6, 1939, and reported in 83 L. Ed., page 435.

This rule is particularly pertinent in this case because the Appellants have not attacked the constitutionality of Chapters 6456 and 7305, Laws of Florida, 1913 and

1917, respectively, but, on the contrary, expressly rely upon them. The constitutionality of only the 1929, 1931 and 1937 Acts are being attacked in this suit.

Ferry v. *King County*, 141 U. S. 668;
Snell v. *Chicago*, 152 U. S. 191.

The contentions and insinuations in the Appellants' brief as to the Sholtz suit being a collusive one and not properly presented to the Court, comes with particularly poor grace, we think, in view of the allegations in the Bill of Complaint (R. 36 & 37) that the Board of Commissioners had failed and refused to try to collect the taxes that were alleged to be due them by the Trustees on certificated lands bid off to said Trustees. An examination of the records in the Supreme Court of Florida will show that this case was not collusive and that it was ably presented and defended by some of the most capable and outstanding lawyers in this State, whose professional reputation is above reproach, and neither do we think the insinuations in the brief are fair to the Supreme Court of Florida for that Court does not entertain collusive suits and the records in that case in said Court show that Messrs. Watson, Pasco & Brown of counsel for appellants since beginning of this litigation filed a brief in that case as *amicus curiae* urging the same contentions urged in this appeal by appellants.

Although it is the duty of this Court to follow the construction of these statutes by the Supreme Court of Florida, as hereinabove demonstrated, we submit that the construction placed on these statutes by the Supreme Court of Florida in the Sholtz case, supra, is the only logical interpretation.

The argument of Appellants to the effect that the Trustees, in addition to paying taxes on lands owned by the State and held by the Trustees, are required also to pay for Everglades Drainage District tax certificates and subsequent taxes is based on the assumption that the word "held" in Section 1541, above quoted, has the same significance and meaning as "held" in that part of Section 1534, above quoted. We submit that the word "held" in Section 1534, has reference only to lands owned by the State of Florida and held by the Trustees as State agents. This Section, originally enacted in 1913, as a part of the Everglades Drainage District Act, Chapter 6456, must be construed with reference to the circumstances then existing and the statutes then in force. Under this theory, such statute cannot be construed to apply to lands held by the Trustees certificated under the provisions of Section 1541, C. G. L., 1927, for the reason that no such statute existed in 1913 and never existed until passed by the Legislature of 1917. Under the provisions of this Section, as originally passed in Chapter 6456, lands were bid off to the Board of Commissioners of Everglades Drainage District. Since from 1913 to 1917 the Trustees held no lands, except State lands, we cannot construe that part of Section 1534, above quoted, to refer to any lands other than State lands. Certainly it cannot be construed to apply to lands that might be held by the Trustees, as agents of the Everglades Drainage District, under said Section 1541, as amended in 1917, some four years subsequent to the passage of Section 1534 in 1913, continued in practically the same identical language through all the subsequent years. State ex rel Board of Commissioners Everglades Drainage District vs. Sholtz, Governor, et al., supra:

"At the time of the original enactment, Section 5, Chapter 6456, Acts of 1913, the Trustees of the Internal Improvement Fund held no land other than that held as agents for the State, in pursuance of the trust imposed upon them, under Chapter 610, Acts of 1855, Section 1384 et seq., Sections 1401 to 1408, Compiled General Laws of Florida 1927. This is indicative of the Legislative intent that the word 'held,' as used in said section and subsequent enactments, applied only to lands held by the trustees as agents of the State, and did not and does not apply to certificated lands subsequently acquired and held by them."

Under the Everglades Drainage District Act, as originally passed in 1913 and continuing until amended in 1917, all lands for which there were no bidders were required to be bid off to the Board of Commissioners of Everglades Drainage District. By amendment of Chapter 7305, Acts of 1917, such lands were required to be bid off to the Trustees. The tax certificates, covering lands bid in for the Board of Commissioners of Everglades Drainage District for 1913 to 1917, continued to be held by such Board until the passage of Chapter 9132, Acts of 1923, which Act transferred said certificates from the Board of Commissioners of Everglades Drainage District to the Trustees.

Such certificates were transferred to the Trustees without any payment for same and without any obligation upon the Trustees to pay for same, and they were authorized to dispose of such certificates in the same manner that they were authorized to dispose of tax

certificates bid in to them under the provisions of Chapter 7305, Laws of 1917. Since these tax certificates were transferred to the Trustees without payment for same, we think that this is very suggestive of the idea that the prior amendatory Act of 1917 did not contemplate payment by the Trustees for tax certificates and subsequent taxes thereon.

There is a clear distinction between the status of the Trustees in reference to drainage tax certificates bid in for them and the status of a common purchaser in reference to the same. The law requires the Tax Collector, when there are no bidders, to bid off the lands for the Trustees. The Trustees are required to receive and be custodian of such certificates. The Trustees have no option as to whether they will or will not take these certificates. They may not plead that they have no funds with which to pay for these certificates, nor that they do not desire such certificates, nor can they decline them for any reason. They cannot consult their judgment as to whether they shall be holders of lands by virtue of such certificates, but by law they are made the instrumentality through which such certificates must be handled. They are held subject to conditions imposed by law. They are subject to redemption. They are subject to sale upon condition of notice given.

The status of a common purchaser is quite different. He exercises his own judgment as to which, if any, lands he will purchase. He may decide whether or not he has money to justify a purchase. He may select such lands as he may desire and may bid such amount as he chooses provided such amount be within the limitations required by law. He takes the certificate subject to the right of

redemption but within a specified period. At the expiration of the time limit for redemption, he may perfect his title and thereby extinguish all rights of the original owner. None of these privileges enjoyed by the common purchaser are enjoyed by the Trustees. Such being true, there must be and there is a wide difference between the status of a common purchaser and the status of the Trustees, as holders of such certificates. Consistent with this wide difference is the following: The common purchaser is required by statute to pay for the certificates which he purchases. The Trustees are not required by statute to pay for certificates bid off for them by the Tax Collector unless by a strained interpretation of the word "held," as used in Section 5 of Chapter 6456 (1534 C. G. L. 1927) which having a specific meaning when passed in 1913, should be construed in the statute, Chapter 7305, Acts of 1917, to have the same meaning and to relate only to State owned lands, although Section 12, Chapter 6456, Laws of 1913, now Section 1541, Compiled General Laws of Florida, 1927, provides that when taxes are not paid on lands in the District, that the whole tract shall be bid off to the Tax Collector for the Trustees and shall be "held" by said Trustees during the period herein allowed for the redemption of said lands in like manner and with like effect as lands sold to the State for non-payment of State and county taxes. The law as to redemption of lands bid off to the State for the non-payment of taxes in force at the time this law became effective did not vest the fee simple title in the State, but allowed redemption at the time tax deed was issued. See:

Hightower v. *Hogan*, 69 Fla. 86, 68 So. 669;

Also:

Dissenting opinion of Judge Bryan in *Rorick* v. *Board of Comm'rs. of Everglades Drain. District*, supra, p. 1063;

Also:

Wall v. *McNee*, 87 Fed. (2d.), 768,

where the Circuit Court of Appeals of the Fifth Circuit held as follows:

> "The statutes regulating the collection of property taxes in Florida are fully stated in the above-cited cases. Such taxes, while not a personal charge against the property owner, are a lien upon the property assessed. When not paid, the property is offered publicly for sale and, if no one will bid the amount of the taxes charged against it, it is knocked off to the State and a sale certificate issued accordingly. The property may be redeemed by the owner within two years. If not then redeemed, the title vests in the State but may still be redeemed until otherwise disposed of. The cited cases make it plain that the State holds but as trustee for the taxing authorities concerned, and, when it receives money for the property, the money should go to discharge in due order their claims. * * *"

If Section 12 of the 1913 Act was amended for the express purpose, as contended by Appellants, to impose liability on the Trustees to pay taxes on certificated lands, why was not the statute amended so as to clearly express this intention. This was a heavy burden to

place on the Trustees and one that should not be thrust upon them in the absence of clear and express provisions to do so.

See:

State ex rel. Little Yellow Drainage Dist., et al., v. *Juneau County, et al.*, 227 N. W. 12;

where the Supreme Court of Wisconsin in speaking on this question said:

"A legislative purpose to make the county absolutely liable to the drainage district for delinquent drainage assessments is not to be lightly imputed. Such a rule would make the county a guarantor of the payment of all such assessments without its consent. Under such a rule drainage assessments would have the resources of the entire county back of them, and there could be no such failures as arose in the Dancy Drainage District, the affairs of which have frequently been before us. Why should a provision negativing the liability of the county on these drainage tax certificates be necessary, when the plan of the drainage law taken as a whole reveals simply an intent to utilize for the collection of these drainage assessments the machinery perfected by statute and court decisions for the collection of general taxes? No such intent should be imputed to the Legislature in the absence of a plain, express, affirmative provision imposing such a liability upon the county. No such affirmative provision is to be found

anywhere in the law, but, on the contrary, the provisions of paragraph 2 of said Section 1379-24 of Chapter 557 of the Laws of 1919 contain an express negation of any such liability."

Section 23, Chapter 6456 of 1918 (Section 1557, C. G. L. 1927), likewise contains an express negation of such a liability on the State of Florida in the following language:

> "Provided, however, that no obligation authorized by this Article shall be construed as an obligation of this State, but only as the obligation of the drainage district herein created."

Chapter 12,016, Laws of Florida, 1927, authorized the issuance of additional bonds in the Everglades Drainage District and in this Act it was specifically provided that the Trustees should pay the taxes on all certificated lands bid off. This Act forms the basis of the decision in the case of Martin v. Dade Muck Land Co., 116 So. 449, 95 Fla. 530, yet with the specific direction and command in the Act for the Trustees to pay these taxes, the Supreme Court of Florida very strictly construed this provisions of the statute and held that it meant that the taxes could be paid only from the proceeds of sale of swamp and over-flowed lands owned by the Trustees. This Act was repealed and no other Everglades Drainage District Act, before or since, contains any such direction or command. Is it not reasonable to assume that if the Legislature had intended to make the Trustees pay these taxes that it would have said so in plain and explicit terms in the 1917 Act.

Appellants contend that the Trustees actually made payments of the taxes on these certificated lands for certain years and this was a departmental construction of the Act, and should guide this Court in construing the Act. While it is well settled that a departmental construction of an Act is a guide to the Court in its construction, it is not conclusive on a Court and should not be followed when the public benefit or right is involved and when the construction itself is manifestly incorrect.

See:

Pennoyer v. McConnaughy, 140 U. S. 1, 23.

The Appellants buying these bonds were charged with knowledge of and bound by the contents of the statute and cannot now rely on an erroneous departmental construction of the Act. This erroneous construction by the then Trustees is not a part of the bond contract and no right of Appellants has been violated by the Trustees refusing to longer follow this erroneous and manifestly incorrect construction.

See:

Martin v. *Busch*, 93 Fla. 535, 112 So. 274,

where the Supreme Court of Florida said:

> "The State Trustees cannot by allegation, averment or admission in pleading, or otherwise, affect the legal status of or the State's title to sovereignty, swamp and over-flowed or other lands held by the Trustees under different statutes for distinct and definite State purposes."

The alleged agreements of the Trustees to pay for certificated lands bid off to them, are shown by the copies of Minutes of said Trustees under dates of March 10, 1924, and June 15, 1925 (R. 27, 30). The answer of the Trustees (R. 135) recites copy of a letter from Spitzer, Rorick & Company to the Board of Commissioners of Everglades Drainage District, under date of June 16, 1925, as follows:

> "* * * And in consideration of the Trustees of the Internal Improvement Fund agreeing this date, that from now on it will promptly pay at Everglades Drainage Tax Sales, in cash, for all lands bid in or automatically struck off to said Trustees at said Tax Sale instead of waiting until two years thereafter, as heretofore, and in consideration of your Board agreeing that no additional part of said $3,500,000.00 bonds shall be issued prior to January 1, 1929, without our written consent, we hereby agree to now purchase from your Board $1,250,000.00 out of said $3,500,000.00 recently authorized, said bonds to bear date of January 1, 1926, unless some other date is hereafter mutually agreed upon, and to bear interest at 5% per annum, payable semi-annually in gold coin of its present standard of weight and fineness, both principal and interest to be payable at the National Park Bank in the City of New York, unless some other New York Bank shall hereafter be mutually agreed upon, and said bonds shall be in denomination of $1,000.00 each and shall mature serially in 10 to 30 years from their date in approximately equal installments, unless some different maturities

for said bonds shall hereafter be mutually agreed upon. Said bonds are to be issued and delivered to us in New York prior to February 1st, 1926, and we agree to pay you therefor an amount equal to a 5-5/8% basis figured on the average maturities of said bonds from their date."

It is averred in the answer of the Trustees (R. 135, 136) that no part of the $1,250,000.00 of new bonds mentioned in said letter were purchased by Spitzer, Rorick & Company. Since Spitzer, Rorick & Company has not lived up to its agreement the Trustees cannot be held bound by their alleged agreement.

We respectfully submit that both of the above alleged agreements of the Trustees if considered by the Court as a part of the bond contract are *ultra vires*. The Trustees, as agents of the State of Florida, could not by contract affect the trust funds of the State. The Trustees are limited in their powers by statute and they are not authorized to make pledges of State funds. Spitzer, Rorick & Company were charged with the duty of knowing the statutory powers, as well as limitations, of the Trustees. They were also charged with knowledge that any attempted pledge by the Trustees of funds belonging to the State was contrary to public policy, as well as the statutes of the State, and the provisions of our State Constitution, which have heretofore been recited.

It was incumbent upon Appellants to allege the power of the Trustees to make such agreement, but they have failed to make any such allegation or to set up any facts disclosing any such power.

It is particularly necessary for persons dealing with a trustee to take careful notice of the scope of his authority and it is well settled that a trustee cannot charge the trust estate by executing contracts unless authorized to do so by the terms of the instrument creating the trust.

It is a well known principle of law that the neglects or omissions of public officers as to their public duties will not work an estoppel against the State, and that the State can not be estopped by the unauthorized acts of its officers, and a State is not estopped from denying the validity of a contract made without authority even though the contractor has in good faith performed services under it since he must, at his peril, know the authority of those who seem to act for the State.

Where a public officer undertakes to bind the State by a contract, he must possess a real as distinguished from an apparent authority derived from the statute, and if the authority does not exist the State cannot be held bound by such contract.

> "Where a public officer undertakes to bind the State by a contract made in his behalf, he must possess a real, as distinguished from an apparent, authority, derived from statute; and if the authority does not exist the State cannot be held bound by such contract, upon the theory that the officer has so conducted himself with respect to the contract as to estop himself from denying its validity."

Camp v. *McLin*, 44 Fla. 510, 32 So. 927;

Stewart v. Stearns & Culver Lbr. Co., 56 Fla. 570, 48 So. 19; 6 R. C. L. 712, Contracts 120;

Escambia Land & Mfg. Co. v. *Ferry Pass Inspectors & Shippers Assn.*, 59 Fla. 239, 52 So. 715;

Haimovitz v. *Hawk*, 80 Fla. 272, 85 So. 668; 26 R. C. L., 1279, 1281, 1316, Trusts 129, 131, 175; 10 R. C. L., 706, 801, Estoppel 32, 112;

Miller v. *Chase & Co.*, 88 Fla. 500, 102 So. 553;

Jeems Bayou Fishing and Hunting Club v. *U. S.*, 260 U. S. 561.

The construction contended for by the Appellants would be in effect to make the State liable for the payment of these taxes and, indeed, the Appellants advertised in their prospectus to prospective purchasers of these bonds which they sold "that they were practically guaranteed by the State of Florida." (R. 198). This is contrary to the general practice of the State of Florida in making internal improvements because the State of Florida cannot borrow money for any purpose, under its Constitution, nor can it, or any of its agencies, pledge its credit. Section 10, Article XII, Constitution of the State of Florida.

It has been the policy of the State to make internal improvements without incurring debts and to live within the income of the State, which policy is particularly apparent in the late highway construction program carried on by the State in recent years. Debts or obligations are synonymous with bonds as construed by the Supreme Court of Florida in Advisory Opinion to the Governor, 94 Fla. 967, 114 So. 850, in which this language is used:

> "In our view any attempt to authorize an agency of the State to borrow money or issue any promise to pay which would be an obligation of the State for anticipated public work is in violation of the provisions of the Constitution upon that subject,"

and in which opinion in paragraph 5 of the Syllabus, the Court further said:

> "State bonds can be issued only for the purpose of repelling invasion or suppressing insurrection. *The spirit, as well as the letter of that inhibition should be preserved and given full force and effect.*"

The very purpose of the original Everglades Drainage District Act, Chapter 6456, Acts of 1913, was to create a special district, with a special board, separate and distinct from any State Board in order that such district, with its governing board, might be in position to issue bonds without any obligation resting upon the State and without violations of constitutional provisions of the State prohibiting State bonds and the pledging of the credit of the State.

The history of the Everglades Drainage District and the legislation pertaining thereto, to and including the sale of Everglades Drainage District bonds, shows that it was not the purpose of the Trustees of the Internal Improvement Fund or of the Legislature that the Trustees should be obligated to pay for Everglades Drainage District tax certificates bid off to them or the subsequent taxes on lands covered thereby, and this is shown by the following:

(a) In a report from the old Drainage Board, created under the Acts of 1905 and 1907, and the Trustees of the Internal Improvement Fund to the Legislature of 1913, the following language is contained, as shown on page 911 of the Senate Journal of 1913: (R. 161-162):

> "We are of the opinion that in order to get the best results that it is necessary to push the drainage operations much more rapidly than in the past. It is also our opinion that there are only two ways in which the operations can be carried on as rapidly as should be—one is by levying a very high drainage tax within the drainage district, and another is by providing by law for the issuance of drainage district bonds, which said bonds should be secured by the drainage tax to be levied upon the lands only in the drainage district, the interest on said bonds, and the sinking fund for their retirement to be provided from the said drainage tax. This plan would not create a State debt and would require a tax only in the drainage district upon lands benefitted. As the lands held by the Trustees constitute only about one-fourth of the land in the drainage district the taxes on State lands held by the Trustees would be for only one-fourth of the obligation incurred on account of the proposed bond issue."

(b) That the Legislature of 1913 amended the Everglades Drainage District Bill which, when finally adopted became Chapter 6456, Acts of 1913, which amendment was never altered to and including the date of the sale

of all Everglades Drainage District bonds, as shown on page 2233 of the Legislative Senate Journal of 1913, as follows (R. 162):

> "Mr. Calkins, by unanimous consent, offered the following amendment:
>
> Add to Section 23 at the end thereof, the following: 'Provided, however, That no obligation authorized by this Act shall be construed as an obligation of this State, but only as the obligation of the drainage district herein created.'
>
> Mr. Calkins moved to adopt the amendment. Which was agreed to,"

(c) That the issue of bonds without any recital therein that the Trustees of the Internal Improvement Fund were required to pay for Everglades Drainage District tax certificates when bid off to the Trustees, and to pay subsequent taxes on lands covered thereby, is a recognition upon the part of the Board of Commissioners of Everglades Drainage District and the bond purchasers that the Trustees are not required to make such payments.

2. THE STATUTES IF CONSTRUED TO IMPOSE THE OBLIGATION UPON THE TRUSTEES TO PAY TAXES ON THE CERTIFICATED LANDS ARE UNCONSTITUTIONAL AND VOID BECAUSE OF DEFECT IN THE TITLE AND BECAUSE THEY ALLOW THE STATE TO

BECOME INDEBTED CONTRARY TO THE CONSTITUTION OF THE STATE OF FLORIDA.

If the Court should construe the 1913 and 1917 laws so as to require the Trustees to pay the taxes on certificated lands bid off to them, it is clear that this construction would force the State to pay these taxes because the Trustees are State agents.

The Union Trust Co. of N. Y. v. *The Southern Inland Nav. & Imp. Co.*, 130 U. S. 565.

The beneficial interest in and to all the assets which the Trustees own is vested in the State of Florida, and 25% of receipts from the sale of all lands by the Trustees are by Section 4, Article XII, of the Constitution of the State of Florida, directed to be turned over to the State School Fund, and under Section 5 of the same Article the said fund remains sacred and inviolate. The Trustees have no other assets except public lands, which were granted to them in trust, and the proceeds thereof, by the State. Chapter 610, Laws of Florida, Acts of 1855, now Section 1054, Revised General Statutes of Florida, 1920 (Sec. 1384, et seq., C. G. L., 1927).

It is obvious if the statutes are construed so as to impose the duty on the Trustees of paying the taxes on the certificated lands, then the Legislature in enacting the statute has pledged the credit of the State for the payment of the bonds of this District contrary to Section 6, Article IX, and Section 10, Article IX, of the Constitution of Florida, which are as follows:

"The Legislature shall have power to provide for issuing State bonds only for the purpose of

repelling invasion or suppressing insurrection, or for the purpose of redeeming or refunding bonds already issued, at a lower rate of interest." Sec. 6, Article IX, Constitution of Florida

"The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual." Sec. 10, Article IX, Constitution of Florida.

It is clear from these provisions of the Constitution that neither the State, nor its agents, the Trustees, are permitted under our Constitution either to issue bonds for drainage purposes, or to loan or pledge the credit of the State for the payment of such bonds. The Appellants cite the case of Trustees I. I. Fund vs. Wm. Bailey, 10 Fla. 112, as authority for the Legislature to pledge the internal improvement fund, but Appellants failed to apprize the Court that the ruling of the Supreme Court of Florida in this case was under the Constitution of 1838, which contained no such provisions, as above quoted, prohibiting the State from issuing or guaranteeing bonds of any person or corporation.

See Advisory Opinion to Governor, 114 So. 850, 94 Fla. 967,

where the Supreme Court of Florida said:

> "In our view any attempt to authorize an agency of the State to borrow money or issue any promise to pay, which would be an obligation of the State for anticipated public work, is a violation of the provisions of the Constitution upon that subject * * * the spirit, as well as the letter of that inhibition, should be preserved and given full force and effect."

The Appellants also cite the case of Martin v. Dade Muck Land Co., 116 So. 449, 95 Fla. 530, as authority for the proposition that the Legislature did have the right to authorized the District to issue these bonds and require the Trustees to pay them. The ruling of the Court in this case applied only to Chapter 12,016, Acts of 1927, which has been repealed and under which no bonds were ever issued. The holding in that case was based on Section 4 of said Chapter, which contained a definite statutory requirement for payment by the Trustees in case there was no bidder for the land. The Court will see from reading this opinion that the Supreme Court of Florida limited the construction of this Act very closely, which limited construction is not contended for in this case, but the Appellants in their Bill of Complaint and in their brief insist that there is an unlimited obligation on the Trustees to pay taxes on the certificated lands.

Title to Chapter 7305 does not indicate intention to require trustees to pay taxes. Therefore, provision in the Act if construed so to do would be unconstitutional.

Section 16, Article III, of the Constitution of Florida, provides in part as follows:

> "Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be amended or revised by reference to its title only; but in such case the act, as revised, or section as amended, shall be re-enacted and published at length."

It is not contended that the 1913 Act required the Trustees to pay the taxes on the certificated lands, but it is contended that by reason of the amendment to this Act by Chapter 7305, Laws of Florida, Acts of 1917, that this duty was imposed on the Trustees. The title to Chapter 7305 is as follows:

> "AN ACT TO AMEND SECTION 9 OF CHAPTER 6456, ACTS OF 1913, LAWS OF FLORIDA; SECTION 10 OF CHAPTER 6456, ACTS OF 1913, LAWS OF FLORIDA, AS AMENDED BY CHAPTER 6957, ACTS OF 1915, LAWS OF FLORIDA; SECTION 12 OF CHAPTER 6456, ACTS OF 1913; LAWS OF FLORIDA; SECTIONS 16 AND 17 OF CHAPTER 6456, ACTS OF 1913, LAWS OF FLORIDA, AS AMENDED BY CHAPTER 6957, ACTS OF 1915, LAWS OF FLORIDA; AND SECTION 20 OF CHAPTER 6456, ACTS OF 1913, LAWS OF FLORIDA, RELATING TO THE CREATION OF EVERGLADES DRAINAGE DISTRICT OF THE STATE OF

FLORIDA, DEFINING ITS BOUNDARIES AND PRESCRIBING ITS POWERS, AND AUTHORIZING THE LEVY AND COLLECTION OF TAXES AND ASSESSMENTS UPON THE LANDS IN SAID DISTRICT FOR THE PURPOSE OF DRAINAGE AND RECLAIMING THE SAID LANDS AND CARRYING INTO EFFECT THE PROVISIONS OF SAID ACT."

It is clear from a careful reading of this title that it is in conflict with the above quoted provision of the Constitution; no where does it give any notice of intention on the part of the Legislature to impose the burden upon the Trustees of paying millions of dollars of taxes on lands they did not own. If there was ever an Act which deceived the Legislature, if it is to be construed as the Appellants contend, this Act is one. In the case of Webster v. Powell, 18 So. 441, 36 Fla. 703, the Supreme Court of Florida had occasion to pass upon the validity of Chapter 4414, Laws of Florida, Acts of 1895, entitled:

"AN ACT TO AMEND SECTIONS 1270 AND 1272 OF THE REVISED GENERAL STATUTES OF THE STATE OF FLORIDA, RELATING TO SUPERSEDEAS ORDERS AND SUPERSEDEAS BONDS."

The Court held this title insufficient and, therefore, the whole Act invalid on the ground that the title was deceptive and in violation of Section 16, Article III, of the State Constitution, and in the opinion the Court said:

"* * * One of the objects of the provision, as stated by Cooley (Const. Lim. p. 172) was 'to

prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles give no intimation, and which might therefore be overlooked, and carelessly and unintentionally adopted.' The history of legislation had shown that, by adroit management, provisions had been incorporated into measures in no way indicated by the title, and that members of the legislature had voted for such measures in ignorance of such provisions."

3. THE STATUTE ALLOWING THE SETTLEMENT BETWEEN THE TRUSTEES AND BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISRICT HAVING BEEN PASSED IN 1931, AND THE APPELLANTS HAVING FAILED TO ENJOIN, IF POSSIBLE, THE ENFORCEMENT OF THE 1929 AND 1931 ACTS FOR 7 YEARS, THEY ARE GUILTY OF LACHES AND, THEREFORE, ARE NOT ENTITLED TO ANY RELIEF.

This Court in the former consideration of this case, 57 Fed. (2d) 1048, page 1063, used the following language with reference to change of personnel of the Board of Commissioners of Everglades Drainage District:

"As to the sixth question: The provisions of the 1931 act, changing the personnel of board of commissioners to five civilians in lieu of five State officers as originally provided, impairs no vested contract right of plaintiffs. The district remains, with officers empowered to perform all its duties toward bondholders. Neither

the resources nor the remedy for the payment of plaintiffs' bonds are affected within the purview of the contract clause of the Constitution. A mere change in personnel of a public board or body is not usually regarded as an impairment of contract obligations. See State v. Knowles, 16 Fla. 577; Graham v. Folsom, 200 U. S. 248, 26 S. Ct. 245, 50 L. Ed. 464; Mobile v. Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. Ed. 620; State v. Goodgame, 91 Fla. 871, 108 So. 836, 47 A.L.R. 118; Board v. Phillips, 67 Kan. 549, 73 P. 97, 100 Am. St. Rep. 475; 1 Cooley Const. Lim. (8th Ed.) p. 560; 12 C.J. 1008."

Section 65 of Chapter 14,717, Acts of 1931, makes provision for the transfer of Everglades Drainage District tax certificates from the Trustees to the Board of Commissioners of Everglades Drainage District.

The title of said Act specifically includes such provision. The title of the Act begins with the following words:

"An Act relating to Everglades Drainage District,"

and among other provisions contained therein is the following:

"Providing for the transfer of certain tax sales certificates to Board of Commissioners of Everglades Drainage District."

The provision of Section 65 providing for such transfer is a distinct subdivision of the Act and such pro-

vision may properly be upheld even though the taxing and other provisions of said Act should be held invalid.

The inconvenience to the public, to the respective boards and to third parties, and the confusion and disorder that would result from a disturbance of the settlement on September 18th, 1931, between the Trustees Internal Improvement Fund and the Board of Commissioners of Everglades Drainage District are proper matters for serious consideration. About six and one-half years have elapsed since said date and all of the tax certificates and records have been transferred from the Capitol at Tallahassee to the City of West Palm Beach. Many tax certificates held by the Board of Commissioners of Everglades Drainage District, under such settlement as well as certain certificates retained by the Trustees, have been redeemed, cancelled or sold to individuals, and doubtless many suits to quiet titles have been filed and adjudicated. In such situation, it is apparent that any disturbance of such settlement at this late date would work serious confusion, disorder and inconvenience and would jeopardize the interests or titles of numerous persons in and to lands acquired under such tax certificates.

We quote from 32 Corpus Juris, 81 to 83, Injunctions 66, as follows:

> "On an application for an injunction it is the duty of the Court to take into consideration the injury or inconvenience which may result to the public in case an injunction is awarded. Accordingly, while there are decisions apparently to the contrary, the weight of authority is to the

effect that when the issuance of an injunction will cause serious public inconvenience or loss, without a correspondingly great advantage to the complainant, no injunction will be granted. So while there is some authority apparently to the contrary, it is generally held that if the injunction would have the effect of greatly injuring or inconveniencing the public, it may be refused even though as against defendant the complainant would be entitled to its issuance."

"In suits for relief by injunction, the Court in the exercise of its discretion will consider the injury or inconvenience which will result to third persons by the issuance of an injunction."

Attention is also called to the case of *Bronson* vs. *Board of Public Instruction*, Osceola County, 108 Fla. 1, 145 So. 833, 836, where our Supreme Court stated that it was committed to the doctrine above quoted and affirmed the decision of the lower Court in denying an injunction.

See also *State* vs. *Thursby*, 104 Fla. 103, 139 So. 372, and especially the comment of the Court under headnote 8, page 377, in which case writ of mandamus was refused.

4. UNDER THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, THE LOWER COURT HAD NO JURISDICTION TO ENTERTAIN THIS SUIT AS AGAINST THE TRUSTEES IN THEIR CAPACITY AS STATE AGENTS BECAUSE THE SUIT IN EFFECT IS ONE AGAINST THE

STATE, THERE BEING NO PROVISION IN THE CONSTITUTION AND LAWS OF FLORIDA AUTHORIZING SUCH A SUIT AGAINST THE STATE.

Chapter 610, Laws of Florida, Acts of 1855 (now Sections 1384 and 1385, C. G. L., 1927), created the Trustees of the Internal Improvement Fund and vested in them certain lands granted to the State under Acts of Congress of March 3, 1845 (Chap. LXXV Vol. 5 U. S. Statutes at Large, p. 788), together with swamp and overflowed lands, under date of September 28, 1850 (Chap. LXXXIV Vol. 9 U. S. Statutes at Large p. 519, 520). These lands were granted to the State of Florida in fee simple, subject only to a trust to use them or the proceeds thereof for internal improvement purposes, and then the State of Florida vested these lands in the Trustees subject to this same trust. This trust, however, is not between the purchasers of the land and the State, but it is between the United States and the State of Florida.

Everglades Sugar & Land Co. vs. *Bryan*, 81 Fla. 75, 87 So. 68, 257 U. S. 667;

Am. Emigrant Co. vs. *Adams Company*, 100 U. S. 61;

Trustees I. I. Fund, et al. vs. *Root*, 63 Fla. 666, 58 So. 371;

Mill Co., Iowa vs. *Chicago, Burlington & Quincy R. R. Co.*, 107 U. S. 564.

Therefore, this suit cannot be construed to mean a suit brought by Appellants to require the Trustees to

comply with the trust by which the land was originally granted by the State of Florida, for such a suit cannot be brought by them.

The Trustees have no other assets except the proceeds of the lands granted to them by the State, and if the Trustees have to pay these taxes the loss must by necessity fall on the State. Therefore, the conclusion is inevitable that this is a suit against the State and this Court does not have jurisdiction because of the Eleventh Amendment of the Constitution of the United States, which is as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

There is no provision in the Constitution or laws of the State of Florida allowing a suit against the State.

> *Hampton, et al.* vs. *State Board of Education,* 105 So. 323, 90 Fla. 88;
>
> *Sou. Drainage District, et al.* vs. *State,* 112 So. 561, 93 Fla. 672.

The Court must keep in mind that this is not a suit brought to enjoin the Trustees from acting under some unconstitutional statute, but one against them as officers of the State to require them to perform certain duties under statutes whose constitutionality is not attacked. This is a suit in which affirmative relief is asked against the agents of the State of Florida. The prayers of the Bill

(R. 73, 64, 66 and 71) ask that the Trustees be required to pay the money that is claimed to be due by them to the Board of Commissioners of Everglades Drainage District. An accounting is asked of the Trustees requiring them to show all the assets which they have in order that the same might be subjected to the payment of whatever amount the Court might find was due by them to the Commissioners of Everglades Drainage District.

The authorities on the question of when a suit is within the prohibition of the Eleventh Amendment are thoroughly discussed by this Court in the case of Pennoyer vs. McConnaughy, 140 U. S. 1. The dividing line between suits which are suits against the State and those against an officer is stated on page 16 as follows:

> "The dividing line between the cases to which we have referred and the class of cases in which it has been held that the State is a party defendant, and, therefore, not suable, by virtue of the inhibition contained in the Eleventh Amendment to the Constitution, was adverted to in Cunningham vs. Macon & Brunswick Railroad Co., where it was said, referring to the case of Davis vs. Gray, supra: 'Nor was there in that case any affirmative relief granted by ordering the governor and land commissioner to perform any act towards perfecting the title of the company.' 109 U. S. 453, 454. Thus holding, by implication, at least, that affirmative relief would not be granted against a State officer, by ordering him to do and perform acts forbidden

by the law of his State, even though such law might be unconstitutional.

"The same distinction was pointed out in Hagood vs. Southern, which was held to be, in effect, a suit against the State, and it was said: 'A broad line of demarcation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void. 117 U. S. 52, 70."

See also:

State Highway Commission vs. *Utah Construction Co.*, 278 U. S. 194;

Postal Tel. Cable Co., vs. *Alabama*, 155 U. S. 482;

Minn. vs. *Northern Securities Company*, 194 U. S. 48;

Cargyle vs. *New York Trust Co.*, 67 Fed. (2d.) 585.

These cases all substantiate the opinion in the Pennoyer case to the effect that when there is any affirma-

tive relief asked against State Officers or agents, which affects the State, either directly or indirectly, that the State is then a party to the suit and the same cannot be brought in the Federal Courts. We have demonstrated that if the Trustees have to pay these taxes the State of Florida will be the one that will pay them and on whom the loss will fall. The record in this case shows that the Appellants advertised the fact that these bonds were guaranteed by the State of Florida (R. 198), and if the State has guaranteed these bonds, as the Appellants contend, then the State is responsible for the payment of the taxes on the land and the conclusion is inevitable that this is a suit against the State and contrary both to the State and Federal constitutions.

The answer of the Trustees, Paragraph 5, Subdivision (d) (R. 159) and Paragraph 16 (R. 165, 166) shows the financial status of the Trustees and their inability to pay taxes on certificated lands. Such status is the same today except that unpaid taxes are now greater. Since the Trustees do not have the money nor the assets to pay the unpaid taxes, if this Court should determine that they are liable for the taxes on the certificated lands, the burden would be upon the State to pay these taxes. Therefore, this is a suit against the State.

The Trustees, by virtue of law occupy dual positions. As originally created they are definitely agents for the State. However, under the Everglades Drainage District statutes they were made agents of the Drainage District. This situation is not unusual in the State of Florida for in numerous instances additional duties are imposed upon State Officials, such as the provision in the Everglades Drainage District statutes making the

State Treasurer, Treasurer of the District. The added duties to the Trustees, as well as the State Treasurer, made them agents of the District in addition to their duties as agents of the State and the two agencies are distinct and separate functions.

This Court has specifically recognized and declared the Trustees to be a State agency in the case of Union Trust Company of New York vs. The Southern Inland Navigation & Improvement Company, 130 U. S. 567, the 5th headnote of which reads as follows:

> "The Trustees of the Internal Improvement Fund of the State of Florida are merely agents for the State, invested with the legal title of the lands for their more convenient administration; and the State remains the beneficial proprietor . . . ."

Since the Trustees are State agents and since the State remains the beneficial proprietor of all lands vested in the said Trustees and since the Trustees have no funds except the proceeds derived from such lands, it follows that to require the Trustees to pay for Everglades Drainage District tax certificates when bid in for them, together with subsequent taxes thereon, would be the equivalent of requiring the State, as beneficial proprietor of such lands, to make such payment. Since this suit undertakes to compel such payment, it is to that extent a suit against the State and is prohibited by the above quoted provision of the United States Constitution.

The Appellants in this suit seek to do more than merely enjoin the Trustees from performing duties under the 1929, 1931 and 1937 Laws of Florida, alleged to be

void, but attempt to secure a decree against the Trustees determining that they are liable for several millions of dollars in taxes on lands which they do not own, to require them to pay these taxes, and to render an accounting if they do not have funds enough to pay them. If the Trustees were compelled to perform these affirmative acts, they would have to do so as State agents under statutes, the constitutionality of which has not been attacked. Clearly, insofar as any affirmative relief is asked this is a suit against the State.

Respectfully submitted,

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UPREME COURT OF THE UNITED STATES.

No. 554.—October Term, 1938.

. C. Rorick, Joseph R. Grundy and J. R. Easton, Appellants, *vs.* oard of Commissioners of Everglades Drainage District, et al.	Appeal from District Court of the United States for the Northern District of Florida.

[May 15, 1939.]

Opinion by Mr. Justice Frankfurter.

The case is here on appeal under Section 238 of the Judicial Code amended (28 U. S. C. § 345) to review a decree of a district urt of three judges convened under Section 266 of the Judicial de as amended (28 U. S. C. § 380) denying an interlocutory in-nction and dismissing the bill and supplemental bills. The bills allenged the validity of certain Florida statutes as impairments of e obligation of contract between the Board of Commissioners of verglades Drainage District and the appellants, as holders of some its outstanding bonds. The decree of the district court was based its conception of the applicability of *Erie R. R.* v. *Tompkins*, 304 S. 64, but this and other questions are not now open for con-deration if Section 266 does not cover a situation like the present. there be a jurisdictional barrier here, it binds us though not in-ked by the appellees.

The record is singularly obscure. This litigation, which has ex-ded over eight years, is but one phase of a complicated contro-sy pursued in both state and federal courts.

The bill was filed on May 19, 1931. A supplemental bill was filed y 4, 1931. The prayers of the bills were amended on November 931. A district court of three judges was convened on November 1931. On September 17, 1932, orders were entered denying a ion to dismiss, and granting an interlocutory injunction condi-ed on the filing of a bond for $50,000. Answers were filed in ober and November, 1932. The required bond was not given on February 23, 1933 an order was entered that the interlocu-injunction should be vacated. The matter then lay dorman-

until a second supplemental bill was filed on July 19, 1937. It was not until August 2, 1938, that the order sought here to be reviewed denying the motion for an interlocutory injunction and dismissing the bill, was made.

The facts will be summarized only to the extent necessary to expose the jurisdictional problem. The Everglades Drainage District (hereafter called District), comprising a large acreage in the southern part of Florida, was established by Chapter 6456, Laws of Florida, Acts of 1913. The administration of the District was entrusted to a Board of Commissioners (hereafter called the Board), a body corporate. The lands were originally part of a grant made by Congress to Florida in 1850 whereby Florida undertook to apply the lands and proceeds derived from them to drainage and reclamation purposes. In fulfillment of this obligation Florida, in 1855 (Chapter 610, Laws of Florida, Acts of 1855), vested the lands in trustees of the Internal Improvement Fund (hereafter called Trustees) consisting of designated state officials. Subsequent legislation for the District made numerous changes affecting its financial administration and the relations between the District and the Trustees (Chapters 13,633, 14,717; 17,902, Laws of Florida, 1929, 1931 and 1937). The changes concerned rates of taxes, disposition of their proceeds, procedure in cases of tax delinquency, and authorization of bond issues.

Appellants sued as holders of bonds issued prior to these latter statutes claiming that they impaired obligations created by such bonds as defined by Section 23 of the Act of 1913 which specifically provided that the terms of that Act should constitute "an irrepealable contract" between bondholders and the District. In substance the bill and the supplemental bills alleged a reduction of the available taxes below those in effect at the time the bonds were issued, an adverse change in the debt service, and a diversion of revenues to purposes other than those required by the Act of 1913. The bills also complained of important changes effected by the later Acts regarding tax delinquencies on the lands in the District. It was alleged that under the earlier Act lands on which taxes were delinquent were to be sold at auction and, for want of bidders for the amount of taxes plus costs, were to be bid off to Trustees who were under a duty to pay for tax certificates as well as the drainage taxes in the future. Violation of contractual rights were alleged in that Trustees had ceased paying for the tax certificates as well as

the drainage taxes, and that Section 65 of the 1931 statute had declared that Trustees held the certificates in trust for the District and required them to transfer the certificates to the District. Further violations of the contract were attributed to powers given to the District, after 1913, whereby it was authorized to compromise taxes, to accept bonds for redemption of lands, and to cancel tax liens on lands which came into the ownership of the United States. Finally, a claim of impairment of contract was based on changes in the membership of the District after 1913.

The Board of Commissioners, the Trustees and various county tax officials were named as defendants in the suit. The bills sought to enjoin the defendants distributively, and with much particularity, from effectuating the various modifications made by the Acts of 1929, 1931 and 1937 concerning the rates of taxes, the disposition of their proceeds, the procedure in cases of tax delinquency, the authorization of bond issues, and the internal relations between the District and the Trustees as all these were claimed to be orginally defined by the Act of 1913.

This appeal is properly here only if the present suit required the convening of a district court of three judges under Section 266. We do not think that this was such a suit, because the state statutes from which relief was sought do not constitute legislation "of general application," *Ex parte Collins*, 277 U. S. 565.

Ex parte Collins, supra, reinforced by *Ex parte Public National Bank*, 278 U. S. 101, authoritatively established the restricted class of cases to which the special procedure of Section 266 must be confined. "Despite the generality of the language" of that Section, it is now settled doctrine that only a suit involving "a statute of general application" and not one affecting a "particular municipality or district" can invoke Section 266. Plainly, the matter here in controversy is not one of statewide concern but affects exclusively a particular district in Florida. This Court in effect so held in denying a motion for leave to file a petition for writ of mandamus to convene a court under Section 266 made by the Board of Commissioners in a suit by a bondholder claiming impairment of the obligation of contracts existing under the 1913 Act. *Ex parte Everglades Drainage District*, 293 U. S. 521. The present suit differs from the earlier case in that here the trustees of the Internal Improvement Fund were made defendants. But what is decisive under Section 266 is not the formal status of the officials sued but the sphere of their functions regarding the matter in issue. An official

though localized by his geographic activities and the mode of his selection may, when he enforces a statute which "embodies a policy of statewide concern," be performing a state function within the meaning of Section 266. *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89. Conversely a state official charged with duties under a statute not of statewide concern is not a state functionary within the purposes for which Section 266 was designed. What was matter of local concern in *Ex parte Everglades Drainage District, supra*,—the administration of the affairs of the District—remains matter of local concern in the present suit. The nature of the controversy—legislation affecting a locality "as against a policy of statewide concern"—has remained unchanged even though the present bills made it pertinent to join the Trustees. This suit thus fails to satisfy an essential requirement of Section 266.

Since the time for appeal to the Circuit Court of Appeals has expired, and since the jurisdictional problem determined in this case had not been fully settled prior to this decision, we will not terminate the litigation by dismissing the appeal but, in accordance with the practice followed in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, we will order the decree vacated and the cause remanded to the district court for further proceedings to be taken independently of Sec. 266 of the Judicial Code.

So ordered.

Mr. Justice DOUGLAS took no part in the consideration or disposition of this case.

Test:

Clerk, Supreme Court, U. S.

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